No. 2849

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ELIZABETH M. PRICE,

Appellant,

vs.

MARIE DEWEY WALLACE,

Appellee.

Appellant's Petition for Re-Hearing and Certificate of Counsel

Upon Appeal from the United States District Court for the District of Oregon

WM. H. HALLAM, Solicitor for Appellant

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Clerk.

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Appellant prays the court for a re-argument of the above entitled cause, upon the following general grounds to-wit:

(1) Unfounded judicial assumption of fact, whereby the decree is vitiated.

Twelve vital errors of fact in the judicial citations of the record, will be specified herein with full particularity.

(2) Unfounded judicial statements of law, whereby intolerable conflict and confusion have upset the rules of law and evidence in the same territorial jurisdiction.

(3) Fatal disregard of the instructions given by the supreme court to this court in the kindred case of Daniels vs. Wagner, 237 U. S. 547 to no other result, in the case at bar, than the triumph of a despicable fraud, and the shelter of an atrocious outrage.

By these deplorable errors, the miscarriage of justice is calamitous, and the conflict of laws is a reproach. I shall project the following comment at the opening, and sustain it at the close.

If the kingdom of evil which this defendant struggles to set up in equity, will not *stand,* without quite so much *variety* of judicial deviation from the facts of the record, then from every judicial consideration, let it fall with a *bang,* that your righteousness may surge *in* like the waves of the sea.

An "unfounded" judicial opinion is an *erroneous* judicial opinion, as the supreme court found the same to be, in Daniels vs. Wagner; and indeed when we reach the point where that postulate descends to the arena of challenge or debate, we shall have fallen on poor ways indeed.

High equity does not step *this* way aside from the *fact*, and *that* way aside from the *law*. Equity steps impressively *forward*, with indignant self-respect, on proper occasion, while it smites the traffic of those who defile the temple, and reinstates the reign of truth and law.

In support of these *propositions* and these *comments*, I beg leave to offer the following exposition:

I.

Something is withheld by the defendant, which was committed to her in sacred trust, for the family of Mr. Smith. Of this the whole record admits neither *legal* nor *actual doubt*. The faithless trustee must disclose the *terms* of the trust, or the law constructs that disclosure for her. Only by avoiding the record can any one resist these conclusions.

II.

Phenomenal instructions were delivered by the supreme court to this court in reversing this court, at 237 U. S., 547, Daniels vs. Wagner. The supreme court there stated rudimentary principles of fact and law to this court, with distinguished emphasis, and the persistent disregard of those instructions is indefensible. That case and this *agree in fundamentals*, albeit they differ in events. The two cases correspond; first, in the native malfeasance, which raises constructive

trusts in equity, and they correspond, second, in the "unfounded" judicial positions of fact and law expressly condemned by the supreme court there, and painfully obvious in repetition here.

By these judicial digressions, unlawful turpitude of the defendant had gone unwhipp'd of justice there, and by these judicial digressions, unlawful turpitude of the defendant, has gone unwhipp'd of justice here.

This petition will be based upon the facts of the record that are *known,* and *conceded,* and *confessed;* a line of contemporaneous *documents,* a line of *concurring witnesses* and *equities,* and for the defense of the defendant, a line of *confessed* perjuries, detestably *committed* and abjectly *admitted* after admission, was *compelled* by the accusing *documents.*

One typical illustration may suffice for the moment. On the witness stand, in the presence of the court, the defendant appraised her husband, at the value of a beast of the field, in the matter of his parental *constancy,* but when she met a letter of her agent, she confessed her impeachment, with abject abandon; a stirring incitement surely to judicial wrath (Rec. pp. 457-8).

Coming to the witness Wilbur Hartzell, she valued him as a perjured fellow (Rec. pp. 439-41), because he plainly told the court how she

one time *expressly confessed* unto him, the *trust lodged in her* by that fatherly love. (Rec. pp. 133-136). And when her *own witness, C. A. Brown,* is shown to have written a *contemporaneous letter* of the same tenor as *Hartzell's testimony* (Rec. pp. 605-6), she impartially bespatters *friend* and *foe,* an added incitement, surely, to righteous judicial indignation, and jealousy of judicial respect.

But, in a *long review* of the *evidence,* the court below goes *around* Mr. Hartzell *entirely,* at the very interesting point of the road where he gives the court that conclusive information; goes around this impeaching letter of the defendant's agent, with *its* unquestioned information; excludes, on the trial, this impeaching letter of the defendant's *witness;* omits *all* the defendant's *impeachments; omits her detection, confession* and *crime;* builds on her *perjuries,* omitting her *confessions,* and awards her the monstrous injustice she asks.

So it is always. The whole record is an *enlargement* of this *photograph,* witness letter and judicial oversight, perjury exposure and confession. So much thereof as to extend this petition beyond desirable length.

The whole shameless twenty-page answer of the defendant is a mere expansion of those false calumnies, which she *retracted in court* upon the

compulsion of the *writings;* so also as to her whole shameless thirty pages of direct examination; all one long drawn perjured slander upon her dead husband, and the stability of his parental affection, *first,* toward his *"daughter,"* and *second,* toward his daughter's *babes*—perjury on the very face of it if Smith was any *man* at all, and perjury on *this defandant's own unavoidable retraction* and *confession.*

Yet the marvel of the case is this, that the long opinion below, on which you build tracks with the defendant's *perjuries,* and ignores the defendant's *retractions.*

The phrases of Smith's fatherly letters could not touch the *phrases* of the judicial *opinion below,* at any point, without *fire work.* Those good letters to his "adopted daughter" throughout his last four earthly years, not one of them more perfect than the very *last,* put those parental models of Smith's composition anywhere within igniting distance of the composition of that long judicial *opinion,* and the *whole judicial fabric* which clothes your own decree, goes up in one light flash of flame (Rec. 592-598, and 94-114).

IV.

This court says we assigned error "in very general language," but the court *omits all refer-*

ence to our assignment of errors *Number III.* That assignment of error is the full two and one-half page text of the portion of the record to which it relates, namely, the aforesaid letter of C. A. Brown (Rec. p. 115). This court does not rule upon that assignment of error *yea* or *nay.*

I will state this fact, *as* a fact. You cannot touch that assignment of error, on any side, or discuss it on any side, without revealing this defendant's whole story in the light of an execrable perjury, and her whole conduct in the light of a nefarious robbery.

This court, like the lower court, discloses neither that tell-tale letter which was *excluded,* nor the like testimony of Hartzell which was admitted.

What objection can be made to this letter of C. A. Brown, which was *excluded,* that could not be made to the letter of Ed J. Price to Jessie Carey Smith, which was *admitted* (Rec. pp. 17-19, Rec. p. 604)?

In any event, what is the ruling of this court upon the testimony of *Hartzell,* and upon our *assignment of error* concerning that *letter?*

The testimony of *Hartzell,* which *was admitted,* does the silence of both courts go to its *veracity* or its *legal sufficiency?* I have no way to *know.* But this much all may know, it is too

late now to question his veracity, after his testimony has faced the court below, unassailed these two years, and faced this court unassailed these nine months, and the unquestioned law of like cases is cited in my brief. The statement of Hertzell is *true*, and the corroborative statement of Brown *is true*, and the truth so revealed, stamps the defendant's whole *story* as *false*, and her whole *conduct as that of a false trustee!*

The court below *publishes* the testimony of *Mrs. Hartzell* and this complainant and calls those testimonies the "plaintiff's proofs" (Rec. pp. 109 and 107-8), but will you also publish that like letter of C. A. Brown, and that like testimony of Wilbur Hartzell, *and then say there is no fraud here?* You have *not* done that, and, it cannot be *done*. Hard to explain that evidence? It is impossible to explain it. There *is* no way to disclose that evidence and decide for the defendant. The court has *avoided* this case—*not* decided it.

V.

Not a letter in this whole record do you deem "worthy of special mention," except the *spurious* or doubtful ink of *this defendant's own.* I call it spurious or doubtful because from the best recollection of her own witness it was spurious or doubtful (Rec. pp. 533 and 536), *and, in any event,* that ink was *more than four years*

old when Smith *died,* while Smith's *own last ink,* with its message of love and money and tenderness, was scarcely more than dry when he suddenly died.

"There is a lack of strength in plaintiff's case upon the most essential issue," says this court. There is no more essential issue than the *truth* which this *defendant confessed, soon after Smith died,* and the *perjury* she *confessed* on the *witness stand.* If the court does not disclose the documents that prove these things, what evidence *would* the court disclose? Too little evidence? Too *much* evidence for the consumption of the court. There is no way to reveal these undisputed facts, and also write an opinion in favor of the defendant. There *is* no way.

Smith's family affection, in the lapse of years, seemed to "drift away," swears the defendant, with nervous eagerness (Rec. p. 454). Those two words, "drift away," epitomize the defendant's whole long sworn defense, but within the next ten minutes, madam, you will *recant* and *retract* those soulless, rapacious words, every vestige to the *dot* of an *i,* when that contemporaneous *letter* of your talkative *agent* stares you in the face, "When your fear cometh as desolation and your destruction as a whirlwind." (Rec. p. 600.) You will end by *confessing* what, too, Smith's *own* very *latest letters* show beyond *all*

doubt, that to the *last hour* of his *life* the *complainant's status* in *Smith's mind* was that of his "*adopted daughter,*" and, second, that down to the time of his last dinner with you, the defendant, the last night before his sudden death, he was "very *fond*" of the two boys, "and very *proud* of them, too (Rec. pp. 457-8). "Proud" signifies a buoyant, proprietary interest. You will confess, *verbatim,* madam, the *truth* of those *words so quoted* from *your agent's letter.* And so she *did,* and a long *answer,* and a long *defense, collapse* in their *whole repulsive* and *admitted decadence.*

Child robbery is merciless, and truth is merciless when it overtakes that infamy. Equity cannot be unprovoked by those loathsome crimes, for those loathsome motives, *committed* and *confessed before* her eyes, and *in* her forum. But here the court *saw* a wealthy *mother foiled, before* the court's *face,* in the black *endeavor* to strip a child *naked,* of *name,* and *place,* and *status,* and *purse.* You saw it, and human crime can sink *no deeper* than that crime which your eyes have seen confessed, and your hands have failed to reveal.

Child robbery before your eyes is a wretched defense to child robbery behind your back.

Such child robbery is *indescribable* and *pattern fails me* for the task in *hand.*

Where is the court? This court dwells now, where it dwelt in the cognate trust case of Daniels vs. Wagner., *supra.,* in a castle in the air, with no spot on earth for its lodgment or foundation.

VI.

There is no *conflict* in this *evidence,* as the *defendant* finally *leaves* the evidence, and leaves the witness stand, discredited and accused; no defense either upon the rules of *evidence* or the rules of *perception.*

Smith's will? Not so fast. Smith's will is not the hand maid of perjury, crime and oppression, under any rule of evidence, or any rule of honesty. Look at that a moment.

We claim a collateral family disposition—yea or nay? She must answer and she *has* answered in great profusion. She must stand or fall in *open battle of veracity.* She cannot hide a *perjury* behind a *will.* That back door is *closed.* Wrong *can* lose every avenue of *escape.* A case *can* be the same on both sides, and it *is* the same on both sides, when the *defense breaks* and *veers* clear to the side of the *complainant, whenever* it comes face to face with a contemporaneous *document* On all the authority, this is *not* a suit to break a will (Cases cited in brief).

Those twelve judicial departures from the truth will very soon reveal *themselves.* For when

at last, with the legal burden of accounting for this iniquity upon her, the defendant in her impeachment and disgrace *actually says*: "I cannot account for it; no, I cannot account for it," (Rec. p. 460) courts of equity should then spend no long laborious opinion *accounting* for her unworthy defense, after all her *own* ingenuity and effort, as an accountant, is *exhausted* and *falsified.* Such judicial accounting, to the credit of the defendant, where the defendant herself has *failed,* can find no ledge of fact to sustain it, and in that novel judicial attempt, judicial aberration must *follow* as the *night* the *day.*

The best that can be done now would have been better save for this defendant's misdeed. The poison can never be removed entirely. And so long as monstrous evil in the world continues to rise up anew, the war of wisdom will be relentless and implacable; relentless and implacable in the blind, deaf madness of righteous anger. No plea more false and insidious than that falsest of all cries, peace, peace, where there is no peace, pardon and exoneration for the culprit when the culprit herself, discredited and defeated, will neither desist nor repent.

VII.

Let us notice here a *few unchallenged documents, laws* and *witnesses;* and let us view them, too, in the interpretative light that none can es-

cape, namely, *fourteen years substance of the parental relation,* which light the defendant finally concedes, and which light *Smith's tender letters show,* undimmed in its *golden glow* to the *eve of his death* (Rec. p. 597).

On that substance of the parental and filial relation, hang all the documents, witnesses, equities and legal presumptions.

"For love is lord of Truth and Loiallie." Abiding parental love, proved and conceded, will clothe the helpless family, as naturally and inevitably as the spring adorns and decorates the earth. That substance of 14 years is not the sport of a breeze, a word, a moment, an incident, a perjury, or a *system* of perjury and fraud.

Brutes leave nothing to their young. Men do. Smith was not the brute she swears he was to "drift away."

I have provided liberally for my daughter, said Smith to the *defendant's mother,* referring to Smith's first will, on the eve of his marriage to the defendant (Rec. p. 609). It is impossible that he could have had that conversation about the will with my mother, swears the defendant on the witness stand (Rec. pp. 461-62).

"I shall at the proper time provide for their suitable education, *wrote Smith,* of the boys in a *letter* (Rec. p. 592)."

"I expect to take care of them, feel toward them *as if they were my own boys and shall always provide for them," said* Smith to our witness Wilbur Hartzell (Rec. pp. 139-40).

"Dear Bess: Your *good* letter *just* received. You know how *dearly* I love Donald and Bobby, and that I will always take an interest in them," wrote Smith with inclosure of money, in one fair sample letter *three years after he married this defendant,* and six months *before* he made his last will (Rec. p. 595).

I would not have insisted on her getting a divorce from the doctor if I had not intended to provide for her and the boys, *said* Smith to Mrs. Florence Hartzell (Rec. p. 148).

"Donald . . you have got to leave this house, I will buy you a railroad ticket to any place you want to go. It doesn't make any difference where," says the defendant's witness Lauderdale, in quoting the very words of Smith, as Smith quoted his own words to Lauderdale (Rec. p. 521).

"The children are very dear to me, and it will make a big void in my heart to have them go," *wrote* Smith three years later in a letter (Rec. p. 592).

"When they went away we spoke of them very often *in a casual manner,"* said the *defend-*

ant in her successful appeal *to the court!!* (Rec. p. 451.)

Smith was a man of his word, swears the defendant on the witness stand. Smith was a man of his word, says the court in the opinion below.

"Bess and the children *are well provided,*" said Smith to Mr. Price, Sr., when he visited "Bess and the children" *four months after* he made his last will, at Mill Valley, California, and chatted with Price at Price's store," (Rec. pp. 130-31).

"I want him to have something from me on that day," *wrote* Smith to the complainant, 14 months after his last will was made, referring by "that day" to the birthday of the boy Donald. "I enclose a birthday present of $25 for Donald, and think you had better use about $5 for his birthday, and *you* can use the balance for something for the *house.*" Closing "with much love to the boys, and kind regards to Ned. I am,

Yours lovingly, DAD."

wrote Smith in that same letter shortly before his tragic *death,* this being his very last parental letter to the complainant that can be found (Rec. p. 597).

His last parental message, and it is in black and white—good news to all but the defendant. What rich father could be more thoughtful and kind and considerate to all?

At that same time when that letter was written, there lay the will mentioning neither mother nor child. This naked will, without a supplement, does *not meet* the *conditions prescribed* by the supreme court of Oregon in Holman's Will, 42 Oregon, 363, as follows:

"A thoughtful consideration of *existing conditions* . . . and a *full* adjustment of his property interests from *his peculiar standpoint.*"

He never mentioned to me that last will, which changed his former will, and gave me his every dollar to me, says the defendant on her oath to the court.

He never breathed the good news to me, says the defendant on her oath.

His love of the children seemed to *"drift away,"* year by year, swears the same defendant on her self-same winning oath to the court.

To the day of his death "he was *very* fond of them and *very proud* of them, too," abjectly confesses the same defendant on her oath to the court, *when confronted* by a *letter* of her own providential agent (supra).

He never as much as *mentioned* Bess and the boys to me *once* that I can remember, in *all those last 15 months of his life,* after we last visited them at Mill Valley, swears the same defendant

in her self-same successful story to the court on the witness stand (Rec. p. 454).

Now, for heaven's sake, let us hear a little from some one else.

"I understand she has acknowledged *several times* that Mr. Smith *intended some provision* should be made for them (the children) and *relied* upon *her* to *carry* out his *wishes," wrote C. A. Brown, the defendant's friend and witness, soon after Smith died"* (Rec. pp. 605-6).

"Why, Mr. Hartzell, I think that is one of the finest things P. B. ever did. *He left it all to my honor* to take care of those boys, and I propose *to do it* and see that they have *good schooling.* But I can't do anything for *Bess now"* (Rec. pp. 133-136).

This conversation occurred at the office of the defendant's attorneys in Minneapolis, where Mr. Hartzell had been called, for conference, *just after Bess had sued* the defendant on her claim (Rec. pp. 439-40).

Not a word of truth in any of this, rejoins the self-same, self-discredited defendant, on the witness stand. All false.

The rule of law is this:

"A discrepancy between *declared intentions* and the *provisions* of the *will,* raises a *presump-*

tion, more or less strong, that the will does not speak the *mind* of the testator." Matter of Blair v. Daly, 540-549; 40 Cyc., 1154-55, and cases cited in brief.

By what possibility does this coiled, perjured, unconscionable defense elude that true and stable rule?

"Without some *explanation,* the purpose to ignore his immediate relatives would seem *strange* and *unaccountable,*" says the supreme court of Minnesota, in the very late case of Woodville vs. Morrill, 130 Minn., 92; 97, 153 N. W., 131, 132. What becomes of *that* rule?

"No, I cannot account for that," says the defendant, finally, after her false and criminal effort to show a receding parental affection, on the part of Mr. Smith, was exposed and retracted. "No, I cannot account for it" (Rec. p. 460).

Let her then answer another question: Did the term *"my adopted daughter," twice used* by Smith in Smith's first *will,* define the complainant's status in *Smith's mind, to the hour of his death?* (Rec. pp. 609--585-86).

"I never thought much about it," swears the defendant (Rec. p. 483).

"Since she was forgotten in her adoptive father's will, she must be accorded the rights given

by law to a pretermitted heir," says the court in the equity case of Thomas vs. Maloney, 142 Mo. App., 193, 198; 126 S. W., 522-524, in a case of *virtual* adoption, *without a technical* legal adoption. No court ever stood against that tide. No court can.

"Neither can it be said . . . that because a court cannot decree the status of adoption, it may not adjudge *property rights equitably equivalent* to those *legally incident thereto,*" says the supreme court of Minnesota in Fiske vs. Lawton, 124 Minn., 85-92; 124 N. W., 455, 458.

"*Certain disputable presumptions* . . . are satisfactory unless overcome. . . . The following are of that kind:

5. That evidence *wilfully suppressed,* would be *adverse* to the party *suppressing it,* if produced" (I Lord's Oregon Laws, 799).

By what mighty draught does she propel her iniquitous defense, to an equitable triumph over the prostrate body of all the facts and statutes and equity decisions?

VIII.

This court concedes that "a trust may be created and enforced where filial relationship is actually assumed."

In the case at bar, *was* a filial relationship *actually assumed?* Smith in that *solemn will* says *yes;* Smith in all his conduct to the *last* says *yes.* The defendant *does* not *deny* "I never thought much about it," is her furtive evasion, and this court does neither affirm nor deny. Again I say you have avoided this case—not decided it. No opinion of this court in Daniels vs. Wagner was ever more "unfounded" in point of *law* or *fact* than its opinion now at bar.

IX.

But *again* this court *departs entirely* from the *case.* The court says: "As there was no issue tried of a *legal adoption,* or claim of right by *inheritance* as an adopted child, *no error can be predicated* upon the refusal of the court *to make decision thereupon.*"

.*Statutory adoption* was *never* in the *case.* Such remarks are entirely extraneous, but virtual adoption is both *pleaded* (Rec. p. 4) and *confessed* (Rec. p. 483). There *can be* no *issue* on that which the defendant *confessed,* namely, a *virtual* adoption, the practical relation of "adopted daughter" at the end of Smith's life (Rec. p. 483).

We simply ask the enforcement and execution of that *law* which no court ever *denied,* to that *fact* which the *defendant* does *not deny,* but

this court, and the lower court, have *revealed neither* that undoubted *fact* just cited, nor that undoubted *law* laid down in Minnesota and Missouri *in the cases cited above.*

This court has avoided the unquestioned fact and the unquestioned law, which when put together leave no course open in equity, but to uphold the clear right and overthrow this mighty wrong.

Just as sure as you can read this whole record you can see that the defendant is covering up something and committing a family cheat here, and that, too, by the confessed crime of perjury. Perjury and detraction *so abominable,* upon exposure and confession so *direct,* should receive the *penalty* of the *crime confessed,* instead of a triumphal confirmation. The defendant should have been committed at once, when caught so falsifying the case at its vitals, come what *might* of her *undeserving defense!*

Something is covered up by her. Let her *tell* the *amount or take the complainant's version,* or better still, as she refuses to do either one, let her give the child the child's share, according to the presumption of law, which instead of *rebutting,* she has defied and enraged.

This undenied and undeniable parental substance of 14 years, is *not dissolved,* in *law,* by a

naked, non-committal will. Dismiss all other witnesses, if you choose. It takes more than one dubious looking circumstance, in point of law, after a man is dead and gone, to burn, and tear, and cancel, and obliterate, a life-long record of parental good will, good name, and good fatherly remittances, especially in case of an only child. That is the law. That much of law and respect are due to the dead man and the living truth. Do not judge and condemn the man, after a serviceable life, by one inconsistent but inconclusive event, lest you wrong both the living and the dead. Such is the clear mandate, both of statutes and equity decisions. *Believe* the departed when he professed and sent *forth,* in years of written letters, his pledges of family love and hugs and kisses. *Naturally,* Smith, *in such circumstances,* would remember *both* females, when they were the only two. Demand then, as the law requires, direct and clear accounting and explanation from her, who would pretend to, and profit by, a most unnatural and sudden and iniquitous eclipse of parental manhood and honor. Such a case never, never in equity went for the defendant.

X.

Smith's *first* will, which *remembered* the complainant, on Smith's *wedding day, "recognized* the *agreement"* according to New Jersey law, and

constituted a "*recognition* of *contractual obligations,*" according to *Minnesota* law, and "falls but little short of the recognition of an obligation" according to California law (Appellant's Brief, pp. 66-67), and his subsequent instruction to the defendant, after he revoked his first will, according to contemporaneous writing and testimony that are clear beyond dispute, or accredited denial, remove all doubt of his obligation, to say nothing of the complainant's direct testimony of Smith's promise, under circumstances where no man worthy of the name could be *silent.*

A parental *intent* to give the child a "child's share" in such cases is *presumed* and *enforced,* and instead of *rebutting* that benignant legal presumption, this defendant only aggravates the presumption by her confessed perjuries, while *we fortify* the presumption, by conclusive documentary and oral proof of Smith *injunction to* the defendant, following his antecedent *promise* to the child. Slandering the family relation is a pitiful way to *demolish* the legal *presumption* of family *protection.* It only brings down that presumption with adamantine weight upon the guilty head of the defamer.

Traducing the family love has no potency to *destroy* the family love, nor to destroy its natural and inevitable expression. But when the defendant, in her desperation, says "I cannot account

for it," after she has exhausted her ingenuity and veracity in *pretending* to account for it, she leaves *not one straw* in the *way* of those who *can* account for it.

Let 12 witnesses and twelve documents; then lash her tardy conscience into action. Her own witness, C. A. Brown, can account for it when he publishes in writing the defendant's *repeated confession* of a *trust,* and the subsequent impeachments of her *present oath* (Rec. pp. 605-6).

Wilbur Hartzell can account for it when he relates the defendant's like contemporaneous *admission to him* (Rec. pp. 133-36).

Mrs. Hartzell can account for it when she relates the defendant's *similar confession to her* (Rec. p. 154).

This complainant can account for it when she relates the defendant's similar confession to *her,* after she travelled, at once, from California to Minneapolis, following Smith's death, although not notified of his death by the defendant in time to attend her father's funeral (Rec. pp. 230, 231, 225-26, 559, 455-57).

The defendant *herself* can account for it, when she *enforcedly* makes divers confessions, *direct* to the *court* on the *witness stand!!!*

The decedent himself can account for it when he wrote the words "I shall provide," and fol-

lowed his pledge with four years of letters wherein he always *did* provide. The decedent himself can account for it by his impressive pilgrimage to Honolulu, that he might be present at the birth of his daughter's first child (Rec. pp. 182-85).

The decedent himself can account for it by his joyous visits to the complainant and the boys at Mill Valley, California, in later years, *before* and *after* his last will was made.

The decedent himself can account for it, when he felt the authority to expel the husband and father, and reclaim the daughter with her children to himself (Rec. p. 521).

The decedent himself can account for it, when "facile princeps" he gave his "glad" written "consent" to the daughter's later marriage to Price (Rec. p. 595).

Mr. Price Sr. can account for it when he relates how the decedent on one of those visits to Mill Valley, *after he had made his latest will,* disclosed to him the fact that provision had been made for the complainant and the boys (Rec. pp. 130-131).

Mrs. Lauderdale, *a near neighbor of Smith,* and deposing for the defendant, can account for it, when she concedes, on behalf of the defendant that she never knew the complainant's other name; that Mr. Smith treated the complain-

ant just as an own father would treat his daughter, and that the complainant's conduct toward him "was just as nice as his was toward her" (Rec. 548-49).

Mr. Lauderdale, likewise the defendant's deponent, can account for it when he fully corroborates his wife (Rec. pp. 528-29).

Emily Carlson, also a deponent of the defendant, honored by Smith's long employment, and Smith commendatory letter here in the record; this maid can account for it, when she, too, testifies *for* the *defendant,* and from her very heart corroborates Mr. and Mrs. Lauderdale (Rec. pp. 558-570, 596-7).

The complainant had not the means to take Minneapolis depositions, but we used the *defendant's* (Rec. p. 329).

The defendant's own mother can account for it when she unwittingly exposes the defendant's false and perjured suppression here in court, of her knowledge of the Fargo will (Rec. pp. 461, 608-9).

The complainant can likewise account for it, when she swears that this fugitive Fargo will, on the defendant's wedding day, gave the *complainant* much *less* than Smith had promised *her,* when he thrust out her husband, and less than he promised her again, on the morning after his en-

gagement to the defendant (Rec. pp. 195-198, 212-213, 563-67, 528-29, 548-51).

The defendant can account for it, when she is so much more reticent about this Fargo will than her own mother.

The complainant can account for it, when she tells the undisputed truth, that this Fargo wedding will was concealed from her until long after Smith's death, and until it peered from its hole after the commencement of this suit now at bar (Rec. pp. 214-15).

Mrs. Wright can account for it when she testifies, on behalf of the defendant, that she does not so remember an *original letter* of Mr. Smith, in the tenor of the copy offered by the defendant in her own admitted ink, wherein the complainant is criticised in money matters (Rec. p. 533).

Jessie Carey Smith can account for it when she testifies, all too eagerly, on behalf of the defendant, and yet in direct contradiction of the defendant, when the defendant swears that a telegraph strike kept the defendant from notifying the complainant of Smith's death until the day of his funeral, the fifth day after he died (Rec. pp. 372-3-4).

The defendant herself can account for it by this nervous dread of the girl claimant, and by

this vain hope of keeping her from coming from California to Minneapolis.

Each of these twelve witnesses can account for it; seven of them her *own* witnesses, to-wit: (1) Brown, (2) Lauderdale, (3) Mrs. Lauderdale, (4) Emily Sarlson, (5) Mother Duncan, (6) Mrs. Wright, and (7) Jessie Carey Smith—and these five are ours: (8) Wilbur Hartzell, (9) Mrs. Hartzell, (10) Father Price, (11) Father Smith, and (12) this complainant.

And then those physical verities of the case; those Smithsonian remittances, assistances, voyages, journeyings, attendances, gifts, symbols, memorials, blessings, luxuries and benedictions; those hugs and kisses, engraven on the face of parental letters, and impressed on infant features; that *typical letter* to his daughter fervently indicating that the *pictures* of the two absent boys at Christmas, loomed *higher* in Smith's affection and imagination than all his *other* love tokens from other sources *whatsoever.* He so wrote (Rec. p. 594).

Those noble and visible *realities* of the case, stand in relief, like the mountains of God, in their imperial tints, while the defendant conducts you to her cavernous abode in the dampest diclevities, and whispers in your ear, "I cannot account for it."

XI.

Smith entrusted something to this wife for the benefit of his family, which the wife now withholds, just as sure as C. A. Brown lives; just as sure as Wilbur Hartzell lives; just as sure as Mrs. Hartzell lives; just as sure as Mr. Price Sr. lives; as sure as this complainant lives; just as sure as that letter lives wherein Smith wrote the words "I shall provide"; just as sure as those four subsequent years of letters live, wherein he surely *did* provide; just as sure as his very latest parental letter to the complainant lives and provides; just as sure as that last letter *confirms* his total 14 years of parental experience and "thoughtful consideration"; just as sure as that last parental writing is as generous, and considerate, and painstaking, and fatherly, and disposing as any man's *will* could be; just as sure as he always remembered the "existing condition" that he had turned this "adopted daughter's" husband out of doors; just as sure as he financed this daughter's divorce; just as sure as these tense acts were attended with words; just as sure as he *consented in writing* to the second marriage; just as sure as these high acts laid hold of every shred of honor and decency in him; just as sure as the defendant's seven witnesses, and our five witnesses, testify as they do; just as sure as we can survey the combined testimony of these im-

pressive and unobstructed twelve; just as sure as we can survey the combined and universal testimony of parental solicitude, from the day of the mother who stood before King Solomon to the day of Peter B. Smith.

When we know there was some provision, and *both these parties* know there was some provision, and one of them tells *how much,* and the other *refuses* to tell, there remains just one *possible* rule of evidence and of honesty; the complainant's version is entitled to prevail, *not chiefly* upon her *own assertion,* not chiefly upon the defendant's *default,* but *chiefly* upon the defendant's *confession.*. This brutish child robbery stands exposed to observation and we are here to ask of equity those rights which equity is always swift and eager to accord.

XII.

The following facts are undisputed: The defendant was a widow without estate or offspring, residing with her mother at Fargo, North Dakota. She was engaged in no avocation. What became of the young son of her deceased husband, Captain Graham, I was not permitted to inquire (Rec. p. 476). He was not a member of her family. Smith was very well-to-do. His home was in Minneapolis. This complainant, from the hour of her good mother's death, had been the keeper of that home. According to the

time-honored servant, Emily Carlson, that home was sweet. The daughter had two young babies, sons of the husband whom Smith had ejected. One morning Smith telephoned the complainant that he had an old friend in town, and asked the complainant to join them at lunch. That friend was the defendant. Events moved rapidly. One evening, about two months afterwards, the daugther and some friends attended an entertainment. Smith was alone in his big house in Minneapolis that evening, save and except for the presence of the defendant, and there on that night they engaged to marry. We read of historic characters and forget there are characters today who rival those of whom we read. Smith had lived happily there in that home up to that time, in preference to all of his clubs, in the society of his "daughter" and her offspring, whom he had retined by strife and contention as his own. They were all he had in the world. He said so (Rec. p. 196). We may *know* he said so.

But in fluttered this defendant "with the mein of lord or lady" and engaged his hand, at night time, as he pondered weak and weary. And who was it? She is put on her oath, "who are you?"

"The spirit I that evermore denies." Four years later, Smith visited that family of his at

Mill Valley, California, radiant with joy and gifts. After that last glad visit at Mill Valley he lived 15 months, in Minneapolis, alone with this wife. And today she is on her oath.

After that visit to his family, in *May,* 1906, did he *mention* them *again in all the* 15 *months* down to his sudden and untimely death in *August,* 1917, as he trudged up a mountain side with you on an August midday? In those last 15 months of his life did he *mention them again?*

Nevermore.

Was he constant in bestowing his affection on a child?

Nevermore.

Did he tell you of his will?

Nevermore.

Did he tell you once a *word* of the *care* of his *estate?*

Nevermore.

Did he bid you to continue any one of his intentions, sendings, presents, gifts and tokens, that he showered on his people, ever once a shining penny for the children he adored? Did he ask your least attention on the younger generation? Did he ask you to observe them? Did he will you to remember? Did he bid you to relieve them from his ample stock and store?

Nevermore.

Did he tell you what was said at the time of the *divorce;* the divorce he planned and financed while his daughter was in child-birth?

Nevermore.

Had he *any will* or *thought* in *respect* of these his *people?* Did he lisp a meditation? Can you give us any truth? Can you give us an "account"? Can you breathe an explanation?

Nevermore.

Ghastly, grim and ancient raven; thing of evil, bird or devil, whether tempter sent or whether tempest tossed thee here ashore; be that word our sign of parting! Leave no black plume as a token of that lie thy soul hath spoken. Get thee back into the tempest, and the night's Plutonian shore.

There *was a mental part* in this Mr. Smith. The defendant's confession of it shines like a diamond in the mud. Let us have a judicial decree upon the *facts.* When you know a thing is so, what more do you demand? When you know a thing is so, and the truth is well befitting, what more is there that equity requires?

This dead clammy grip of perjury is wierd and appalling. What is its indissoluble hold and charm? Is there no way to break its spell? Is there no way it can be thrown down from its

high seat? Is there no way it can be dethroned and cast out of equity? Can we never lift our souls from out its shadow? Will it take its beak from out our hearts, *nevermore?*

Twelve blighting, withering impeachments of this ominous presence, by twelve unobstructed witnesses, yet it holds its proud triumphant station just above the chamber door.

I would willingly bury all this spectacle in silence, that crimes so abominable may not be seen to have paraded, without chastisement, before the eyes of the court. But do I say that in lieu of chastisement, there are twelve fatal digressions from the undisputed facts, in one judicial opinion in that wicked person's favor?

I.

"Father speak to me." The words in quotations hereinafter are from the *defendant's own witnesses or documents,* unless the contrary is shown:

We proved Smith's parental agreement with his "daughter" (609) his "adopted daughter" (585-6) at the time when he expelled her husband.

"Donald . . you have got to leave this house," said Mr. Smith. "I will buy you a railroad ticket to any place you want to go. It does not make any difference where" (Rec. p. 521). Donald

had to go, and go he did. Turning then to his *"daughter,"* babe in arms, in that bleeding time, *what did he say to her?* What would be more interesting than to know? And is there *no way* we can ascertain *anything about it?* The *court can find no way!* First let us notice one other thing all agree *he did.* He put her *over his whole house,* "the same as he mother had been." "That was what Mr. Smith told me," says the defendant's witness, the head servant, Emily Carlson, and that position, all concede, she filled the next two years, and until she was supplanted by the defendant (Rec. pp. 564-5).

We can know what Smith said to his *servant,* and we can know what he *said* to his *daughter.* The *complainant* knows what he said, and the defendant knows what he said. The complainant *tells,* and the *defendant refuses to tell.* Do you believe, for one moment, that this woman lived alone with Smith, as his wife, four long years thereafter, morning and evening, summer and winter, without ever learning one thing that her husband had said to his daughter in that tragedy of 1900-1902? Do you believe her, in that *reticence,* any more than you believe her in that bold *assertion,* wherein and whereby she defames Smith's parental affection and confesses the falsehood? Smith seized and held in his hand, in that momentous hour, the fate of these

three young lives. They were powerless to resist. He knew it, and he was not a cannibal. He financed the divorce and made irrevocable the hand of his intervention. The ejected husband is today a prominent surgeon at Carson City, with a new wife and family. Meanwhile this family Smith beheaded, are destitute and Smith is dead. Mr. Smith was of age and he made a bold venture. He had brought up this girl in luxury, and he was persistent now in carrying this family separation to a finality, and he said *something* about the future of those in whose destiny he had busied himself so irretrievably. He knew this was solemn business. This lawsuit deals in *magnitudes.* The units of this case are human careers, and this was no time to shirk. What did Smith say? In that whole drama, *what did he say? Nothing,* that the defendant can *tell;* nothing that the *court can find! Good* or *bad, yea* or *nay; pro* or *con;* in that whole two years; what did he *say?* We are entitled to *know. Nothing* that the defendant can tell; nothing that the court can find.

The speech suppressed is the speech that formed the trust. The statute presumes that the conversations suppressed by the defendants are adverse to the defendant (L. O. L., 799).

In constant terror, like Lady Macbeth, of the load she has to conceal, she struggles pitifully

and miserably to argue that Smith was a very silent man (Rec. p. 452).

The Maclean expulsion is admitted and described by the defendant's witness Lauderdale, but the court can no more find what Smith so *did,* than the court can find what Smith *said.* Smith's *expulsion* of Maclean is an overmastering verity in this case, yet the court below and this court can no more find that admitted *expulsion,* than the *inevitable ensuing conversation.*

"Donald . . . you have got to leave." such is the defendant's own unquestioned proof (Rec. p. 521).

"Trouble arose which resulted in Dr. Maclean leaving," such are the dry bleached bones of the proof, displayed by both courts to a candid world (Rec. p. 101).

In the name of all the sages of equity, I pray you, divulge the pivotal truth of this case, or keep farther away from it.

Some decent parental stipulation for the fate of these babies and their mother, is as *sure* as this strenuous parental *expulsion* of their *husband* and *father,* and that stipulation is *proved* by the *complainant's disclosure* by the *defendant's* desperate attempt at *concealment,* and by Smith's *undeniable* subsequent *directions* to the *defendant.*

What the defendant *conceals* is *adverse* to *herself,* and there is nothing *adverse* to her, on these *issues,* but a *family trust,* and we crave *obedience* to the mandate of the *statute.*

But we are only *approaching* the *judicial errors!* The opinion of the court below *quotes* the complaint, verbatim, and at great length, where she relates how her adopted father ejected her husband, promoted the divorce, and asked her to stay with him, and keep his home, on the promise that all he had should be hers, when he was gone.

Out of this long quotation of the complainant the court makes a *short omission* (Rec. pp. 101-2, 106 and 197-98), and *after* this long quotation the court makes *just one* adverse *comment.* It is an alleged discrepancy of *date.* The complainant says the agreement with her father was made in *April or May,* and that the divorce was thereupon filed when the agreement was made, that she thinks it was, but the divorce was not, in fact, filed until *September.* The court quotes those recitals and bids us remember that the divorce was not filed until *"fall,"* (Rec. p. 106), which might mean September, October, November or possibly, *December 20th,* and so the court leaves an unaccounted, and unexplained discrepancy of possibly as much as 8 months, from *April* to *December,* upon which he bases

that one judicial comment. For aught anyone can know, from the published report of this case, in the Federal Reporter, the complainant might have dropped *out of Smith's sight, that whole space of 8 months;* but when you observe certain *stars,* midway of that long judicial quotation of the complainant's *words* (Rec. p. 102) and discover from the unpublished *record,* (Rec. pp. 198-9) that the few words *omitted* from the court's quotation, where the *stars* are *inserted,* tell you that the complainant was under Smith's parental roof *pregnant,* with her *second child, that summer;* when you learn, as the reward of your inquisitiveness, that the true chronology is this, that the agreement was made in *April or May;* that the complainant's pregnancy was then about *seven months under way;* that the child Robert was born there at home in *July,* and that the divorce was filed in *September,* (Rec. pp. 198-199), after convalescence, and that the judicial *stars,* which you see (Rec. p. 102), take *almost* as much *room* as the *information* they *displace,* (Rec. p. 198), then will you not declare I am far too tame when I say the court has deflected, and digressed from the flint rock of the record? Will you then say the judicial comment becomes at all deceptive? At all laborious? Will you say this court-found discrepancy has become as mist in the wind? Will you not *marvel why* the court made that short omission? Will you say this

pregnancy and child-birth, are worthy of no notice while you are reciting the events of that summer? Will you appreciate the judicial exigency that *removed* these facts from your sight?

Mr. Smith, strong man that he was, in his vast disparity of parental position, promoting the divorce of this "daughter" of 20, in the last stages of pregnancy, yearning over her in the agonies of travail, striving to supply the place of the mother, who had *departed,* since she and Smith *together,* suffered *with* the complaint at *Honolulu,* on the deliverance of her first child, Smith comforting the daughter, now, as best he could, and naming the babe *"Robert,"* because his pet name for its mother was "Bob" or "Bobbie." (Rec. pp. 200, 172). Is all this beneath equitable notice?

Restore those few words that equity has *cut out* of the pulsing heart of this case, and the court's *dead copying* comes to *life,* while the court's projected *doubt* of the veracity of this defenseless girl in a matter of *date,* is converted into her positive *confirmation!*

The eager father and his attorney, knew far more about the *date of filing* the complaint, than this girl, and they timed matters so the case would not be tried during the complaint's confinement.

It is not so much the unfounded and ungrounded judicial comment. It is the judicial blood-letting of the record, ex industria, which furnished the invidious comment nourishment. Truth and gallantry become the noble externals, and baseless reflection becomes the innermost essential. But such judicial subversion requires high pressure effort, and rather futile too, for after all the truth, like a checked and choked up stream, can dash with all its native force, and all its acquired momentum, into the bed from which it has been debarred. The court *shrinks back* from the stubborn facts, and the cardinal truths, and who is to challenge this high judicial portrayal of people and events? For does not the court assure the reader that it *is* a high grade portrait? Does not the court declare that in and by his statements "the relations of these parties are *quite fairly indicaed.*" (Rec. p. 113.)

It is a perpetual judicial memorial of this family, sent to the ends of the earth, upon the high warranty of the national court, on the wings of the Federal Reporter. But this is only a beginning of our grievance and more things happened in the construction of this decree than are dreamt of in your philosophy.

II.

The witnesses suffer with the complainant the sting of erroneous judicial quotation. And so does the *memory* of the *decedent.* As the noonday sun to the starless midnight, so is the Peter B. Smith of Honolulu and Mill Valley to the Smith of this decree. Honolulu and Mill Valley are not on the judicial map. But *Wilbur Hartzell* on the *witness stand* in *Portland* gives *much* the same *impression* as *Smith* at *Honolulu.* Smith's successive letters of his *own,* and Hartzell's words of the *defendant's* own, and C. A. Brown's concurring letter look like harmony to a salutary result, but they all perish together from this judicial decree.

Four witnesses relate the defendant's confession of this trust, soon after Smith's death, four witnesses—two *men* and two *women*—C. A. Brown, Wilbur Hartzell, Mrs. Hartzell and the complainant. The opinion of the court below mentions the two women, omits the two men, calls his review the "plaintiff's proofs," (Rec. p. 109), and says those proofs are "upon the whole" insufficient. (Rec. p. 114.)

III.

Fourteen years substance of the parental relation, comprise the innermost secret of the case. To this all other facts are tributary. Fourteen

years substance of the parental relation *prove* the *contract.* They *directly* prove the *executed consideration,* and the *intent*—very little more proof of a contract is necessary in such cases, even as between *adults* and non-relatives. This is settled in Brown vs. Sutton, 129 U. S. 238-242-3. Following on the heels of that rule, comes the twin law of statute and equity, above cited, that no contract at all is *needed,* in favor of a child of *substantial or technical adoption,* not *named in the will.* The importance of this uncontradicted *relation* of the parties therefore is *obvious.*

As well take the *sun* out of the *sky,* as what the court has taken *out* of this *record early* and *late.*

(a) The court proclaims to the world that at a *certain time* Smith "discontinued all allowances for the support of plaintiff and the children." (Rec. p. 110.) That was in 1906, and *every reader* will *say* that, be the cause ever so *foul* and sinister, no money after that time found its way from Smith to his family, and that his disposing *intent died* before his body. Quite in line with that unhappy conclusion, there is nothing, *nothing, absolutely nothing,* in this judicial delineation, to show that the complainant ever as much as *saw,* or *heard from,* Mr. *Smith* those *last* months of his life. *This self-styled fair statement* of this *family relation* leaves the *re-*

lation a *blank,* and a *cipher* for almost the last crucial year.

And what is the truth? There were *letters* and *remittances* in that time and down to the verge of Smith's tragic death; letters and remittances, as "glad" and cordial and solicitious and fatherly, as any father in any city ever sent to a child in the world. (Rec. pp. 596-7.) A *frightful* judicial divergence from the case. Not the slightest figment of evidence to bolster the assumption of a change of heart or intent.

I would like some time to read a judicial opinion on the *facts* of this case.

A *break* in the family relation this final year? A break there must be, of course, or this defense is a vain contradiction and an infamous fraud. But *break* there was *none*—none even in the *defendant's own* final grovelling *confession!*

How are such judicial representations defensible, and how are they reconcilable with law or *justice?* Justice, august and pure; the abstract of all that is perfect in the spirits and aspirations of men; where the mind rises and the heart expands; delighting in the cause of the weak and oppressed; always eager to rescue, to relieve and to succor; majestic from its kindliness, venerable from its utility, what akin is justice to these

dreary wanderings from the warm hearth-stone of truth? Justice! Who 1900 years ago emblazoned the cheerless hillsides of Palestine, "What have *we* to *do* with *Thee?*"

(b) This judicial *burial* of the family relation in Smith's *final* year, does but follow a like interment alive, of the gladsome person of love in *former* years.

With its, wrong on wrong, exposed and confessed, its, perjury on perjury, exposed and confessed, there is nothing in the grace or character of this defense whereupon it is humanly *conceivable,* why equity *should,* or how equity *can,* discuss the relation of this surviving *"daughter"* and that deceased father, and abate *one jot or tittle* from that sacred relation, much less *denude* the case of that fitting vesture *entirely,* for sixteen months, or sixteen days, or *sixteen minutes,* and then repeat the same judicial treatment, in another period of judicial history.

In the psychological 16 months, from the complainant's marriage in London, England, in 1899, to her mother's death in Minneapolis in 1900, the family relations and visits, to and fro, from father to daughter, and daughter to father, were as constant and cordial, and, in fact *illustrious,* as any *could very well be!* In those 16 months, among other attendances, were the two weeks' marriage festivities of the young couple

with the parents in Minneapolis, and Smith's subsequent voyage and winter sojourn with the young people at Honlulu, and other visits; a series of warm family meetings, those 16 months, like a shower of sparkles that make the light glitter—but not one *shimmering* ray of that glad true light can penetrate the dark opaque walls of this judicial history, of those 16 months—and then to say that in this pitch darkening of the true light the relation of this family is "quite fairly indicated." "No light but only darkness visible."

That which judicially purports to be the history of this family relation those 16 months, shows *no* family relation or communication *whatsoever*. One would *surely think* from reading the *court's opinion*, that the court is treating a family *estrangement*, those 16 months, with delicate touch and lofty consideration, when, in truth and in fact, the family contact was robust and hearty and perfect and perfectly commendable. The whole judicial pronouncement, is *in all effect*, and to all intents and purposes, an "unfounded" judicial animadversion.

Here it is. Here is the judicial history of those 16 months:

"She returned with her husband soon to the United States, and accompanied him as he was transferred from post to post, but later returned with him to the home of Smith in Minneapolis.

. . . . The immediate cause, however, of their coming to Minneapolis was the illness of the plaintiff's mother. After the death of her mother, which occurred on June 12th, 1900, the day of her arrival in Minneapolis, it was arranged that plaintiff and her husband should live with Smith, etc." (Rec. p. 100.)

All that is material is judicially omitted. The court essays a history of these parties and every infinitesimal figment of historic truth that concerns this case, is judicially excluded. "Post to post." Digresion from *fact?* I am far too tame. The warm truth of the case is *here,* and this purported judicial statement of fact is *there* at the *uttermost nadir.* There *is* no earthly *way* to get *farther* from the case. "Post to post." "Drift away." Parity of truthlessness? No, the same identical truthlessness. Put all these specimen Arctic fugitives in the corrective, where they belong. "Post to post." None of the opinion is one whit *better* than those *"posts."* Banish these inarticulate *posts* and *also* the inarticulate post that this woman swears her *dead husband* to have *been* in his "drift away." Throw away all the posts, and call back the *human creatures* of flesh and blood. Do away with this moot case of "inexplicable dumb shows and noise" Wilful. Don't ask me to characterize it, if it is wilful. The havoc is precisely the same whether this total

judicial abjuration of the case is "inadvertent" or "unfounded," if we may employ the terms "inadvertent" or "unfounded," applied by the supreme court to the findings of this court, in Daniels vs. Wagner, supra—inadvertant or no, it was well-nigh fatal. It was well-nigh impossible for this defenseless girl to master the heavy expense of appeal. Inadvertent or no, it is an unfounded smirch on the living and the dead, equally inadmissible, on every hypothesis, in this high and wide spread publication. I have dwelt upon this, because the same remarks apply with equal propriety to that whole unparallelled, astounding, bewildering, judicial opinion and representation of fact and law, which this court declares to be "a well considered opinion."

How well equity scourge the laudable affection of an acknowledged parental relation, and expunge its shining and multiplied tokens. How scourge and expunge the benign fundamentals of this case?

Sixteen months of zero in the family relation, by the judicial thermometer. I had as soon disparge a man's relation to his wife as his relation to his daughter, and I deny the right of any power or office on earth, upon any cause to disparge either. Such arguments whatever the source, are food for the crater of a volcano.

Shrink *farther* away from the determinative facts, I again implore you, or else state those facts as they *are.*

If the reverberating iniquity which this defendant encompasses, cannot win in equity without adding together the defendant's perjury, the defendant's calumny, the defendant's rapacity, and the court's groundless detractions then, as there is a God in heaven and a court of equity upon earth, let the defendant and her iniquity *lose,* for her crimes are not hallowed.

IV.

Worse, far worse than these total judicial errors, are judicial half-truths,.

As indicated above, the false assumption of a *receding parental interest,* is the trunk line both of the *defense and the decree.*

When Smith *first took* the complainant, as a girl of *14,* the court says in effect:

I may *assume* that he treated her with parental regard.

No one can assume. Mr. Smith's parental regard does not rest upon colorless judicial assumption. It rests upon the *robust, living,* indisputable *evidence* of the *defendant's three witnesses,* Emily Carlson, Mr. Lauderdale and Mrs.

Lauderdale. Those same dead *posts* are thrust in front of the *people* and hide the *people.*

Why not give the proof its native hue? Why should we constantly tear from the case its flesh and blood, exhibiting always to the public, bleached bones and "dead-men's skulls and . . . holes where eyes did once inhabit?"

V.

But, again, again! If he *treated her with parental regard,* as a *girl of 14,* how did he treat her as a mother of two children at the age of 26 or 28? *That* is the *far* more *important* question here. How did he treat her at the *last?* How did he view, *as a whole,* his *14 years' experience,* of this parental relation. How then *was* it, *yea* or *nay?* The *letters* for one thing would be splendid evidence, but the court in this regard, promulgates not a lingering *trace* of *evidence,* or even judicial *assumption.* The court *can not deny,* and the court *does not affirm.*

Did Smith treat her with parental regard in his *last two years?* If *no,* you are approaching a foundation. If, *yes,* you have shattered your decree to atoms. How is it then. We have a *right to know.* The court is *silent.* The court has cut its communication with this record in swift, inconsiderate, unreasoning judicial flight, far beyond the tall "posts."

VI.

Half-truth leaps now to double over statement. In this judicial stampede, from the bright light of Smith's last two years, the court finally reaches a halt *8 years back before Mr. Smith died.*

The court arises and *informs* the world that this complainant (8 years before Smith died), traveled abroad with her divorced natural father, Ailes, and while she was with him, the two were Mr. Ailes and Miss Ailes, *not* Mr. Ailes and Miss Smith. No one has ever doubted that this trip, 8 years before Mr. Smith died, was made with Mr. Smith's *consent,* and in the light of the history of the 8 subsequent years, and the six previous years, it would matter not one iota, if this young girl on that early trip, traveled across Europe, with her divorced father, as often as the Kaiser's troop trains.

But in the natural sense of the words, the statement is a laborious exaggeration. She traveled to London, England and back. On the outgoing trip she traveled with her father, Ailes, and on the return with Dr. Maclean, the young army surgeon, whom she met on the voyage and married, upon consent by mail from her parents, before her return, making this junior episode, however, far less remarkable than the senior

wooing of the dependant and Smith at the Smith mansion, as above recited, some three years later.

So if this offense of travel in Europe and this whole episode, *8 years* before Smith died, be more *material,* more *worthy* of equitable *publication,* more consonant with the *relish* and *purpose* of *equity,* than Mr. Smith's noble and thorough-going expressions of family *love 18 hours before he died,* "very fond of them and very proud of them," then I simply must remark again that *pattern fails* me for the task in hand.

This court does not fail to say that (five years before Smith died) the complainant, for a while, joined an opera chorus, but you do fail to reveal the defendant's *confessed* perjuries and slanders, which polluted the air of your court room. "You strain at the gnat and swallow the camel." "Ye tithe mint, anise and cummin and have left undone the weightier matters of the law, judgment and mercy and faith."

"Ye cleanse the outside of the cup and of the platter, but within they are full from extortion and excess."

VII.

A ruder shock, a rougher dislocation of fact, than *all these put together, is false marshaling,* and *judicial displacement.*

The complainant never had a statutory adoption. That fact was not the least impairment of Smith's whole career of parental act, intent, contract, solicitude, and disposition, as the *undisputed* facts show. On cross examination she freely admitted, upon inquiry, that once when a girl she had said Mr. Smith wished a statutory adoption, but her mother thought best not to have it so, because her own father had the prospect of a *gold mine* in Alaska. Smith, in his life time, thought none the less of the girl who made that admission on the witness stand, of a two-party conversation. Courts may stand to, or curve around this fact, or that fact. This complainant stood to the conversation that took place years ago, between herself on the *one* hand, and her then girl friend on the *other,* and she also *stood to* the conversation that took place years ago in the Smith home between herself on the *one* hand, and her adoptive father on the other.

Statutory adoption or no, Smith *long* after that, *twice* in one solemn writing (supra) called her his "adopted daughter," and *always* to the last, called her his "daughter" or "adopted daughter," in his every word and thought and act and gift.

Nothing, absolutely nothing, here to palliate *distortion or dislocation* of truth and fact. But

the court below falls upon this provocation, into a most dismal abyss of error.

The *defendant's* one *witness* to that gold mine conversation with the complainant, locates that talk, *about seven years before Smith's death,* but *read this high judicial statement* of fact in the *Federal Reporter,* and I am *sure* of one thing, *namely,* that from that your trustful reading of the solemn words of a court, it will *never enter your mind to doubt,* that the complainant uttered those words, about the gold mine, when she journeyed to Minneapolis from California, *just after Smith died,* as a *lament,* and a *reason* why Smith had not remembered her!

VIII.

Contrary to the law of civil and criminal cases the court declares that the complainant's testimony must be *"irrefragable,"* reviews the evidence at great length, omits the documents and unobstructed witnesses that *are* irrefragable, and declares the testimony, "upon the whole," insufficient.

In the late case of Coe vs. Coe, 75 Or. 511 (1915) on a question of constructive trust, the Supreme Court of Oregon declared that "free from doubt," is *not* the rule of evidence *"in any civil case;"* but the opinion you approve and affirm declares that irrefragable *is* the rule of

evidence in this civil case, and the *same* man on the *same* street must meekly obey both these laws, and I ask you *how* that man can respect *himself* and respect the rules that demand his observance.

Say *nothing* of *civil* cases. Suppose a *criminal* judge should charge a jury: "Before you can find this defendant guilty, the evidence against him must be "irrefragable." Not a man, not a *boy,* sitting in that court room for the *1st time,* would fail to *know* better. His American *blood* would *tell* him, with unfailing accuracy that this thing is wrong, that this community is this day without administration of its laws, that this community is this day without the protecting arm of its government; that this community is this day without the sitting of its courts. This charge and demand of irrefragable evidence in judicial proceedings, would paralyze all movements, defy all law, blockade all justice, and assure full impunity to the uncontained downpour, among the people of every flood of crime, that human fiendishness can contrive, leaving nothing, nothing, absolutely *nothing,* to protect the public from all manner of thievery, save and except the defense of self, and the ordeal of battle; and this you will see is true on its face. The charge and demand of irrefragable evidence is an utter abdication and refusal and withdrawal of the

judicial function, a full stoppage of the government in its service. It is judicial devastation. Small danger that any foreign potentate will eat like that into the root of our institutions. He can scarcely come near enough.

"Beyond a reasonable doubt," is the highest assurance legally demandable of a litigant in any human tribunal and any human controversy.

This daughter's proof of her contract with her father when he put her over his house and home, must be irrefragable before she can recover against the supplanter, when in truth and in fact, on the decisions of equity and the decisions of honesty, so far from irrefragable proof of a contract there need be *no* proof of a contract *whatsoever*. This *daughter* with 14 years of virtual adoption *admitted and conceded,* is *entitled* to *recover* a *child's share* without *any* contract, "since she was forgotten in her adoptive father's will." It is *so held,* and *no court ever held the contrary.* What concentrated blend of judicial error could mount up to a higher climax than this at bar? Says the Supreme Court of the United States, in Brown vs. Sutton, 129 N. S. 238-242-3, even in a case not of a *daughter,* but a case of *adults* and non-relatives, that when the *intent* appears, no very strong evidence is required that a contract did exist. Who, then, *is*

to respect the rulings of the Supreme Court, and what then of this *irrefragable*. It gurrs and gurrs like a wrench in the wheels of justice. How much proof of a contract does the court *require* in favor of an only child of long technical or virtual adoption, recipient of fond letters of love and remittance to the last. It does not *take* much proof of a contract in such a case. It does not take *any* proof when that only surviving child is *not named in the will.*

Here then we have law irrefragable, fact irrefragable, right irrefragable, leaving no choice for equity but to live or to die. This wicked woman is caught in the meshes of this trust, caught despicably robbing a child, but what of the equitable initiative that blandly unlooses her fetters; what of the equitable conscience that is drugged into insensibility?

IX.

Was there, then, never a family jar? Yes, it came when the defendant came, and ended at least 4 years before Smith died, and related to th complainant's short comings as a financier in behalf of her wayward husband, (Rec. p. 519) and served the defendant admirably in the smooth plan of getting all the estate in her hands, what time Smith should pass away.

She seems to have intended at first to give back to the family *some* of the violet velvet, but

the pull of avarice was strong, and vice grew by what it fed on—no new case.

The babes, you know, were not particeps criminis in any financial struggles of their mother. The court quotes a truly Herodian outburst of Mr. Smith, one Sunday evening *4 or 5 years before he died,* at a *Sunday tea,* at the defendant's elbow. He is said to have exclaimed, in the progress of the tea, that he was going to do no more for his family! He was going to stop! And in administering equity what care we for the 4 subsequent years of *letters,* with their *inclosures* which *prove* that he never *did* stop. So long as some one says that he *said* at a Sunday night tea, 4 years before he died, that he was *going* to stop, why look at any later record. All that concerns equity is to see that the history and relation of these parties is "very fairly indicated."

X.

Smith died August 16th, 1907, in an attempt to walk up Mount Washington, New Hampshire, with his wife. He had made his last will the year before, but his wife did not *know* it, for she herself hath said it.

I was not at all surprised when I saw that yellow telegram from the surviving wife to the surviving daughter, and observed that the defendant waited *4 days,* and until she was back in

Minneapolis with the remains, before she made or dated that telegram. Smith died on the 16th. She made and dated the telegram at Minneapolis on the 20th, *careful* to *inform* the daughter, in California, that her father would be *buried* the *next day,* the *21st,* but the much dreaded girl claimant came *anyway,* in a very few days, with her husband to Minneapolis, not to *learn* whether she had rights but because she *knew* she had rights.

The defendant on the witness stand swears a *telegraph strike* caused the delay in making and dating that telegram, and her confederate, Jessie Carey Smith, on the witness stand, swears that *she herself,* was the one who *sent* the telegram *for* the defendant, she thinks, and that the telegraph strike did *not* cause the delay, and the *letter* which they two between them sent to the complainant, *just after* the *burial,* is *here* in the *record,* and makes *no mention* of *telegraph strike* and no *pretense of excusing this disgraceful delay,* and the court says, "I think the explanation of the delay is very clear," and *I* say this this is another frightful judicial separation from the fact and the case. These *letters* and *telegrams,* are dead shot destroyers of the defendant's whole column of crime (Rec. pp. 370-374, 447-50, 559.)

The truth has been crushed to earth in this case, and the error wounded *ought to writhe in* pain.

XI.

All of Smith's letters that we could find are before you. Did the defendant produce any? *Not a single letter,* does she offer to your inspection, *not one.* The nearest approach she makes to it, is to show you some *black ink of her own,* that she *admits* is her *own,* and which she *says* is a *copy* that *she herself* made, with *her* busy pen, of a letter that *Smith wrote.* She copied the letter with her pen *before* Smith *sent* it. Smith *told* her to do that. She *says* so. It occurred more than 4 years before Smith died. (Rec. pp. 429 and 535.) This ink of the defendant's own, indicates that Smith was much irritated at his daughter, there 4 years before he died, about money matters. No ink of *Smith's own* could be *found on earth* with *one single unkind word.*

The defendant's witness, Mrs. Wright, is the complainant's aunt. Mrs. Wright saw the original of that letter, and she does not remember seeing these reflections on the complainant in the original. Her recollection of the letter is that Smith was trying to find a home for *Bess* and the *children* because the new wife "preferred not to have the children around." (Rec. pp. 533-536).

Now, that very dubious looking document upwards of 4 years before Smith died, is the *near-*

est approach that the *lady* or the lady's *counsel,* or the Federal *Court,* is able to make toward presenting any earthly letter of Peter B. Smith, although letters of his own to the complainant, over his own uncontested signature, are strewn through this record before you, all full of parental love and parental remittances, *down to the end of his days,* and I protest and insist such judicial treatment does not give the relation of these parties "quite fairly indicated."

In *every* letter, Smith *said* he *loved* his *family,* most cordially, and for each such vow he almost always inclosed a cash bond as security, down to his very latest letter we have *in 1907.* What then did Smith intend and direct *in 1907?* Tut, tut, tut. What cares equity *what* Smith wrote in *1907,* or what he *did* in 1907. Tell us what this good truthful defendant *says* he wrote in *1903,* and we will tell you what he intended and directed *in 1907!*

Smith at first *hand?* Never! Smith according to the *defendant,* great care being used even then, not to venture nearer than four years to the critical time. Go back until you *can* find an aspersion, even though it be a four years' journey and a most suspicious looking calumny, in the defendant's own hand, as the reward and the goal of this equitable excursion.

Let Smith do his own talking? Indeed no. The *defendant* shall do the talking for him.

Never was the like seen before in equity. What but the utter and hideous destitution of truth and right can be found by that judicial method?

XII.

Look how the court treated the Supreme Court of Minnesota as reported in Robertson vs. Corcoran, 125 Minn. 118, and other cases.

Robertson vs. Corcoran, *deals* with a *domestic relation. So does the case* now at *bar.* The court below *omits those parts* of the opinion in Robertson vs. Corcoran and other cases, which thus deals with the *domestic relation* and *likewise* the court omits those parts of *this* case now at *bar* which deal with the *confessed* and *conceded domestic relation.* It is a *long* way from the *facts* at *bar* to the *opinion* at bar. The spinning flanges of equity clutch the defendant's wavering rails of perjury.

These curves in the judicial route, are something entirely insupportable. When one judicial opinion makes a full dozen such sidewise avoidances, all equally bad, the error of that spiral is too self-evident and unmitigated to justify the discussion of judges and lawyers.

High equity does not step this way aside from the fact and that way aside from the law. Equity steps impressively *forward* with indignant self-

respect, on proper occasion, while it smites the traffic of those who defile the temple, and reinstates the reign of truth and law.

If the kingdom of wrong which this defendant labors to set up, in equity, will not stand, without *quite* so much *variety* of judicial deviation, then from every consideration, let it fall with a bang, that your righteousness may surge in, like the waves of the sea.

Just this following *fraction* of the record is enough, without more:

Point out a case in America or England, where a *strange woman* has come in at a *late day,* with a series of lies on her lips, and carried away every vestige of the family *estate,* from the helpless family, under shelter of the guns of equity. It simply cannot be found. The thing is revolting. Equity *will not* endure it. Your decree is an absolute anomaly of equitable retrogression. "*Drift away!*"

Drift, thou, thyself away, good mother of the family, whom your husband devoutly loved.

A dozen documents, a dozen witnesses, and, above all, the decedent himself, seen in a figuration of parental attendances and kindnesses, all are here in this record, before you, but no one, either witness or document, escapes an implied judicial smirch upon his veracity and integrity,

save and except this one avaricious dispenser of perjury. The court picks up the shattered fragments of the defendant's story, sticks them together and gives the world to understand that no catastrophe whatsoever has happened to her.

But the insistent truth will bubble up like a spring and burst and disjoin the judicial masonry. Truth springs up against you and down against you. What a spectacle in a court of reason and conscience. No judicial decree could be more destitute of truth, and merit, and law and justice, than the decree which stands upon such unrelieved and unmitigated errors of fact.

This decision is a system of error and family detraction, concerning matters which are not the subject of conflict or uncertainty.

When the confessed perjury and crime, in which a defense was conceived, is buried forever, in the archives of equity, the pressure must, in time, develop a dynamic so terrible, that an explosion will be heard to the end of the earth.

I have no more apology for the facts than the defense has for its perjuries and crimes.

This defendant is destitute of *everything* that *makes for equity;* destitute of *justice,* destitute of *fact,* destitute of *law,* destitute of *witnesses,* or *letter or legal citation.* Nothing left but savage

perjury and grovelling retraction, upon which she flashes her winning appeal to equity, perjury spun by herself and her one and only Jessie Corey Smith, spun by these two into a maze of denials and confessions.

You have given judgment, as it were, that a child cries in the night, at the door, and the father within refuses to stir from his eternal debauch. And it is not *true* of Peter B. Smith. It is not *true* of the dead man, nor *fair to his memory*. All who will read this whole record can *plainly see* Smith's intended and stipulated and promised provision for his family. All can see the defendant's cunning fraud. "Drift away." Drift thou thyself away, good mother of your husband's cherished family—drift away to thy fitting habitation; for in this dark drama, you were not surprised by any lion-like temptation springing upon your virtue and overcoming it before resistance could begin; nor did you do the deed to glut savage vengeance, or satiate long settled and deadly hate. It was a cool, calculating, money-making murder, not revenge; it was murder of *estate*, murder of *good name*, murder of *education*, murder of *character*, murder most foul, strange and unnatural. Drift away! Cleanse the records of equity from thy taint and contamination. In the name of God and all his governments, drift away. Take not with you an

equitable triumph on a platter of twelve judicial diversions of fact. No not twelve all one. Retire alone to thy appointed abode where you *can* "account for" this measureless wrong, and where "gaping wide thy mouth for speaking evil . . . thou hast the burning and the head that aches." Drift away. Drift away!

Why do we bring such suits in the Federal Courts when we have the option? For their design and their history.

Almost in sight of the blood-stained snows of the Revolution, the United States courts were ordained and established in order to curb and check and steady the possible short-comings of the local administration—ordained and established like colossal wheels that move in majesty and balance all the works.

And the wisdom of this plan has been signally illustrated in a large number of constitutional cases, wherein have been corrected the errors and asperities of the state courts, many of them really perverse and rfractory.

In that class, by way of mere illustration, are the following cases where sadly needed instruction was handed to the courts of last resort, in the several states of Maryland, New Jersey, Wisconsin, Virginia, Missouri, Georgia, South Carolina, Louisiana, Ohio and New York, namely:

Brown vs. Maryland, 12 Wheat. 419; Wilson vs. New Jersey, 7 Cranch, 164; Tarble's Case, 13 Wall 397 (Error to the Supreme Court of iWsconsin); *Martin vs. Hunter's Lessee, 1 Wheat. 304,* (Error to the Court of Appeals of Virginia); *Worcester vs. Georgia, 6 Peters 515; Craig vs. Missouri 4 Peters, 408; Weston vs. City Council of Charleston (S. Carolina) 2 Peters 449; Ogden vs. Saunders, 12 Wheat. 212 (Louisiana); Osborn vs. Bank of the United States, 9 Wheat. 738 (Ohio); Gibbons vs. Ogden, 9 Wheat. 1 (from New York Court of Errors).*

The error of the court, in the case at bar, is *radical.* The right for which we struggle is no new ideal. The right we covet is simple and rudimentary; a judicial statement of the facts and the ensuing legal and equitable conclusions. If we suffer, without a murmur, the denial of that primal right, at the point where we come in real contact with our government, we need care but little who lays the taxes.

I hope to see the day when the humblest litigant, and the humblest signatory on the roll of federal attorneys, can go into any corner of the land and obtain full, exact and equal justice, in a Federal Court, against all persons and parties whomsoever.

Pardon one personal reference. Fifteen or twenty years more, maybe, will close the earthly

career of every one of us, officers of this appeal. We have traveled more than half the way. The new planet must be daily more and more a reality. The thought is solemn, yet, anything but sad. For my part, if I go tomorrow, or stay thirty years, I shall fight happily while I remain, and then lie down to pleasant dreams.

The intervening shocks will jar me some, but not too much. I shall be always sorrowful, yet always rejoicing. Over against the much we cannot know, we can place one thing, and of that one thing be well assured. When the edicts of legalized equity shall have prevailed in the matter now at bar, it will be a source of long and profound comfort to one and all of us, if, haply, in the sequence of that glad consummation, when our day on earth is done, we may ever find ourselves expectantly saying: "*When* saw I thee *hungry* and gave thee *meat?*" and hear the reply: "Inasmuch as ye have done it unto one of the least of these my brethren, ye have done it unto me."

Then, too, will you have brought to this family, authentic tidings of a departed father, no longer able now, of himself, to answer a cry of distress, but all the while turning over and over and over, in his grave, he who, throughout all his life time, if his family asked bread, would

not give them a stone, and, if they asked a fish, would not give them a *serpent*.

Something bestowed in sacred trust is fraudulently withheld by the defendant. She will not tell how much. She cannot complain when those tell who will; when the *statutes* tell who *will*, and the *decisions* tell who *will*.

Appellant's counsel hereby certifies to the court, that, in his judgment, this petition is well founded, and that it is not interposed for delay.

In the event this petition be denied, appellant prays the court, for an order that the mandate, to the court below herein, be stayed, pending application, which will in due time be submitted to the Supreme Court of the United States, for a write of certiorari, to review the decision of this court, in the case.

Respectfully submitted,

WM. H. HALLAM,

Solicitor for Appellant.